

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANA GLORIA FELIX,

Plaintiff(s),

v.

UNITED STATES DEPARTMENT OF
STATE, et al,

Defendant(s).

Case No.2:24-CV-812 JCM (DJA)

ORDER

Presently before the court is defendants U.S. Department of State, Carson Wu, Antony J. Blinken, Rena Bitter, U.S. Embassy in Frankfurt, Germany, Alejandro Mayorkas, and Ur Jaddou's (collectively "defendants")¹ motion to dismiss. (ECF No. 14). Plaintiff Ana Felix filed a response (ECF No. 17), to which defendants replied. (ECF No. 18).

I. Background

This action arises out of plaintiff's Form I-130 petition for alien relative ("petition"). The following allegations derive from her complaint. In June 2008, plaintiff filed the petition on behalf of her son, Felix Duarte. (*See* ECF No. 1). The petition was approved around October 2009, and was forwarded to the U.S. Embassy in Frankfurt, Germany. (*Id.*). On August 8, 2023, Duarte and his family appeared at the Embassy for their interviews. (*Id.*). Mr. Duarte's application has been

¹ Under Federal Rule of Civil Procedure 25(d), "[a]n action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party." Thus, the court orders that plaintiff file a notice of substitution, identifying the proper defendants that should be substituted out.

1 pending because of “administrative processing.” (*Id.*).

2 Plaintiff alleges that defendants have failed to act on the application in violation of the
3 Administrative Procedure Act (“APA”). (*Id.*). She seeks mandamus relief to compel defendants
4 to adjudicate Duarte and his family’s visa applications. (*Id.*). Defendants move to dismiss
5 plaintiff’s complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (ECF No. 14).
6

7 **II. Legal Standard**

8 **A. Federal Rule of Civil Procedure 12(b)(1)**

9 Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*,
10 437 U.S. 365, 374 (1978). “A federal court is presumed to lack jurisdiction in a particular case
11 unless the contrary affirmatively appears.” *Stock West, Inc. v. Confederated Tribes of Colville*
12 *Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, federal subject matter jurisdiction must
13 exist at the time an action is commenced. *Mallard Auto. Grp., Ltd. v. United States*, 343 F. Supp.
14 2d 949, 952 (D. Nev. 2004).
15

16 Federal Rule of Civil Procedure 12(b)(1) allows defendants to seek dismissal of a claim or
17 action for a lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Dismissal under Rule
18 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on its face
19 sufficient to establish subject matter jurisdiction. *In re Dynamic Random Access Memory (DRAM)*
20 *Antitrust Litig.*, 546 F.3d 981, 984–85 (9th Cir. 2008).
21

22 Although the defendant is the moving party in a 12(b)(1) motion to dismiss, the plaintiff is
23 the party invoking the court’s jurisdiction. As a result, the plaintiff bears the burden of proving
24 that the case is properly in federal court to survive the motion. *McCauley v. Ford Motor Co.*, 264
25 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189
26 (1936)).
27
28

1 More specifically, the plaintiff's pleadings must show "the existence of whatever is
2 essential to federal jurisdiction, and, if [plaintiff] does not do so, the court, on having the defect
3 called to its attention or on discovering the same, must dismiss the case, unless the defect be
4 corrected by amendment." *Smith v. McCullough*, 270 U.S. 456, 459 (1926).

5
6 In moving to dismiss under Rule 12(b)(1), the challenging party may either make a "facial
7 attack," confining the inquiry to challenges in the complaint, or a "factual attack" challenging
8 subject matter on a factual basis. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2
9 (9th Cir. 2003). For a facial attack, the court assumes the truthfulness of the allegations, as in a
10 motion to dismiss under Rule 12(b)(6). *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813
11 F.2d 1553, 1559 (9th Cir. 1987). By contrast, when presented as a factual challenge, a Rule
12 12(b)(1) motion can be supported by affidavits or other evidence outside of the pleadings. *United*
13 *States v. LSL Biotechs.*, 379 F.3d 672, 700 n.14 (9th Cir. 2004) (citing *St. Clair v. City of Chicago*,
14 880 F.2d 199, 201 (9th Cir. 1989)).
15

16
17 B. Federal Rule of Civil Procedure 12(b)(6)

18 A court may dismiss a complaint for "failure to state a claim upon which relief can be
19 granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain
20 statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell*
21 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
22 factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the
23 elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).
24

25 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
26 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual
27 matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citation
28

1 omitted).

2 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
3 when considering motions to dismiss. First, the court must accept as true all well-pled factual
4 allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth.
5 *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by conclusory
6 statements, do not suffice. *Id.* at 678.

7
8 Second, the court must consider whether the factual allegations in the complaint allege a
9 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
10 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the
11 alleged misconduct. *Id.* at 678.

12
13 Where the complaint does not permit the court to infer more than the mere possibility of
14 misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.*
15 (internal quotation marks omitted). When the allegations in a complaint have not crossed the line
16 from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S. at 570.

17
18 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,
19 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

20 First, to be entitled to the presumption of truth, allegations in a complaint or
21 counterclaim may not simply recite the elements of a cause of action, but must
22 contain sufficient allegations of underlying facts to give fair notice and to enable
23 the opposing party to defend itself effectively. Second, the factual allegations that
24 are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery and
continued litigation.

25 *Id.* District courts apply federal pleading standards to state law claims in federal court. *See*
26 *Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017, 1021 (9th Cir. 2013) (applying federal pleading
27 standards to action removed from state court).
28

1 The court, on a motion to dismiss, is limited to the allegations contained in the complaint.
 2 *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). “A court may, however, consider
 3 certain materials—documents attached to the complaint, documents incorporated by reference in
 4 the complaint, or matters of judicial notice—without converting the motion to dismiss into a
 5 motion for summary judgment.” *Ritchie*, 342 F.3d at 908.
 6

7 **III. Discussion**

8 Defendants set forth five arguments in favor of dismissing plaintiff’s complaint. The court
 9 addresses each in turn.

10 **A. Plaintiff has named the proper defendants**

11 Defendants argue that plaintiff’s complaint should be dismissed because she has failed to
 12 name a defendant with the authority to either adjudicate or re-adjudicate Duarte’s visa application.
 13 (ECF No. 14 at 8). Defendants’ argument is unavailing. Plaintiff is challenging the deprioritizing
 14 and delay in processing the application, not the consular officer’s adjudication of the application.
 15 (ECF No. 1).
 16

17 The Secretary of State has the “authority vested by law in any office or official of the
 18 Department of State” and “shall administer, coordinate, and direct the Foreign Service of the
 19 United States and the personnel of the Department of State.” 22 U.S.C. § 2651a(a)(3)(A); *see*
 20 *also Janay v. Blinken*, No. CV 23-3737, 2024 WL 3432379, at *4 (D.D.C. July 16,
 21 2024) (“[nothing precludes [the Secretary] from directing the consular officers to decide pending
 22 applications ‘within a reasonable time.’”) (internal citations omitted); *see also Aminzadeh*
 23 *v. Blinken*, No. 2:24-CV-02025-DSF-MRW, 2024 WL 3811153, at *3 (C.D. Cal. Aug. 9,
 24 2024) (“Secretary Blinken and Acting Director Wu are properly named defendants.”). The court
 25 finds that the named defendants can redress plaintiff’s requested relief.
 26
 27
 28

1 B. Plaintiff's claims are not moot

2 Defendants also argue that plaintiff's claims are moot because the consular office rendered
3 a decision on Duarte's application. (ECF No. 14 at 9). This argument is unavailing. Plaintiff's
4 claim has not been finally ruled upon because Duarte's application is pending administrative
5 processing. *See Li v. Blinken*, No. 8:23-cv-02142-DOC-KES, 2024 WL 2107341, at *3 (C.D. Cal.,
6 April 4, 2024). Thus, plaintiff's claims are not moot.

7 C. A mandatory, non-discretionary duty exists

8 Furthermore, defendants argue that plaintiff has failed to identify a mandatory, non-
9 discretionary duty that a consular officer owes to her. (ECF No. 14 at 10). This argument has also
10 been rejected by other courts in this district. The Secretary of State owes plaintiff a mandatory,
11 non-discretionary duty that Duarte's application will be adjudicated by a consular officer within a
12 reasonable time. *See Durham v. Blinken*, No. CV 24-02868 PSG (MRWX), 2024 WL 3811146,
13 at *4 (C.D. Cal. Aug. 8, 2024).

14 D. Consular nonreviewability

15 Defendants also argue that the doctrine of consular nonreviewability precludes plaintiff's
16 suit. (ECF No. 14 at 14). Other courts in this district have consistently rejected this argument.
17 The doctrine of consular nonreviewability provides "that the consular official's decision to issue
18 or withhold a visa is not subject either to administrative or judicial review." *Bustamante v.*
19 *Mukasey*, 531 F.3d 1059, 1061 (9th Cir. 2008) (quoting *Li Hing of Hong Kong, Inc. v. Levin*, 800
20 F.2d 970, 971 (9th Cir. 1986)). Here, the doctrine is not triggered because plaintiff does not
21 challenge the consular officer's decision—she challenges defendants' delay in issuing a decision.

22 D. TRAC factors analysis

23 Lastly, defendants argue that plaintiff fails to state a plausible claim that the 8-month delay
24
25
26
27
28

1 is unreasonable under *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C.
2 Cir. 1984) (“*TRAC*”). (ECF No. 14 at 16-17).

3
4 However, the court finds it premature to conduct a *TRAC* analysis at the motion to dismiss
5 stage. See *Hui Dong v. Cuccinelli*, No.: CV 20-10030-CBM-(PLAx), 2021 WL 1214512, at *4
6 (C.D. Cal. Mar. 2, 2021) (finding ruling on the satisfaction of *TRAC* factors premature at
7 pleading stage); *Gelfer v. Chertoff*, No. C 06-06724 WHA, 2007 WL 902382, at *2 (N.D. Cal.
8 Mar. 22, 2007) (denying motion to dismiss because “[w]hat constitutes an unreasonable delay in
9 the context of immigration applications depends to a great extent on the facts of the particular
10 case”); *A.C.C.S. v. Nielsen*, No. CV 18-10759-DMG (MRWx), 2019 WL 7841860, at *6 (C.D.
11 Cal. Sept. 17, 2019) (finding *TRAC* factors are “fact intensive inquiry” better suited for decision
12 after discovery).

13
14 Thus, at this juncture, the court finds that plaintiff has plausibly alleged that defendants’
15 delay is unreasonable. She has alleged that it has taken over eight months to process Duarte’s
16 application. Defendants’ motion to dismiss is denied.

17
18 **IV. Conclusion**

19 Accordingly,

20 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendants’ motion to
21 dismiss (ECF No. 14) be, and the same hereby is, DENIED.

22
23 IT IS FURTHER ORDERED that plaintiff shall file a notice of substitution, identifying
24 the proper defendants that should be substituted out, within fourteen (14) days of this order.

25 DATED February 24, 2025.

26
27 
28 UNITED STATES DISTRICT JUDGE